

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



ORIGINAL

75-7255

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United States Court of Appeals  
FOR THE SECOND CIRCUIT

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P/S

JOHN THEODORE GILBERT,

*Plaintiff-Appellant,*

*against*

AMERICAN EAGLE TANKER CORP.,

*Defendant-Appellee.*

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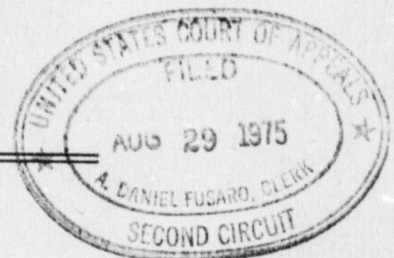
ON APPEAL FROM THE UNITED STATES DISTRICT COURT,  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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PLAINTIFF-APPELLANT'S BRIEF

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

75-7255

-----X

JOHN THEODORE GILBERT,

Plaintiff-Appellant,

-against-

AMERICAN EAGLE TANKER CORP.,

Defendant-Appellee.

-----X

PLAINTIFF-APPELLANT'S BRIEF

STATEMENT OF THE CASE

This is a seaman's action to recover earned wages and statutory penalties for a shipowner's failure or neglect to pay the wages in accordance with the terms of 46 U.S.C. §596. Overtime wages and other payments accruing from the seaman's employment and in accordance with a collective bargaining agreement were also sought in the Court below.

The action was commenced on May 18, 1973 by the plaintiff pro se. On May 1, 1974, plaintiff obtained counsel, and the case was tried before the

Honorable Charles M. Metzner without a jury on December 5 and December 6, 1974.

The Court below rendered its decision on March 31, 1975, awarding the plaintiff the sum of \$46.56 on defendant's consent for its failure to properly credit the plaintiff one day's wages and \$10.00 subsistence for travel time of the plaintiff from the port of Ras Tanura, Saudi Arabia, to New York. Judgment was entered in favor of the plaintiff in the sum of \$46.56 on April 3, 1975.

#### STATEMENT OF THE FACTS

Appellant Gilbert was signed on Appellee's vessel, the S.S. American Eagle, on December 28, 1971 in New York City as a relief second assistant engineer. He boarded the vessel on December 29, 1971 at the port of Ras Tanura, Saudi Arabia, where at the vessel was then located (A75,A188).

At about 5:30 a.m. or 6:00 a.m. of May 20, 1972, at the port of Ras Tanura, the Master of the vessel gave Gilbert \$2,000.00 in cash and a pay voucher signed by the Master reflecting a balance due Gilbert of earned wages in the sum of \$5,121.19

for the period of Gilbert's employment from December 28, 1971 to May 20, 1972 (A51,A139). Gilbert disputed the pay voucher with the Master, claiming that the voucher was short one day's earned wages and one day's travel allowance (A51-A52, A128) and requested that the Master discharge him before an American Consul (A52, A55, A127-A128). The Master advised Gilbert that there was no Consul in Ras Tanura (A128).. Gilbert then, although the Master claimed that he was unable to recollect the conversation, requested the Master to carry Gilbert to the port of Bahrein so that Gilbert could be discharged before the American Consul there (A54-A55, A129). The Master advised Gilbert that the regular engineer was returning to the vessel and that, as Gilbert was a relief man, his employment was terminated; that he could not carry him on the vessel; and that he must leave the vessel (A54, A129). There was conflict in the testimony in the Court below as to whether the Master ordered Gilbert off the vessel on the threat of imprisonment; but, in any event, Gilbert signed the articles of discharge and mutual

release, although under protest, and left the vessel in Ras Tanura at about 11:00 p.m. on May 20, 1972 (A54-A56, A128-A130, A134).

There was also a sharp issue raised before the Court below with respect to whether Gilbert demanded that he be paid all of his earned wages in cash at the time of discharge or requested \$2,000.00 cash and the balance evidenced by the pay voucher (52, A54-A55, A130-A131, A133).

The Master admitted that there was a United States Consular Officer located in Dhahran, Saudi Arabia, about 45 miles or one hour's traveling time from Ras Tanura by automobile and that, on a previous occasion, he had been before that Consul (A127, A142-A147). The Master further testified that the American Embassy itself was located in Bahrein which was the vessel's next port of call; and, in fact, the vessel arrived in the port of Bahrein at 1:55 p.m. the following day of May 21, 1972 (A120, A142, A208).

On May 21, 1972, Gilbert boarded an airplane for flight to Yokohama, Japan, where he had

been residing with his wife since 1968 (A52). The airplane landed in Bahrein at 1:30 p.m. on May 21, 1972; and, although Gilbert tried to go to the American Consul there, he was restricted by that country's immigration laws to the airport area (A56-A57). Moreover, Gilbert testified without contradiction that he was unable to go to the Consul's office in Dhahran on his own, as the dock area at the port of Ras Tanura is enclosed by a barbed wire fence and guarded; and no seaman can get outside that area without special permission from the Saudi Arabian Government and from the Aramco officials who control the refineries there (A53).

Gilbert testified that he arrived in Yokohama on May 28, 1972 and that he made a demand upon the shipowner's agent there for payment of the balance of his wages due as reflected in the voucher, but was refused (A58-A59). The shipowner contested that Gilbert made such a demand.

In addition to Gilbert's claim for one day's earned wages and one day's travel time, which he asserted at the time of his discharge in Ras

Tanura, he presented a claim to his Union for overtime wages and other wages under the collective bargaining agreement between the Union and the defendant, which claims were strenuously contested by the defendant.

However, on July 16, 1972, Gilbert arrived in New York City and consulted with his Union with respect to the disputed overtime wages (A60). On August 22, 1972, Gilbert presented himself at the defendant's office in New York with a representative of the Union. Gilbert testified that, at that meeting, he again demanded that he be paid the balance of his earned wages. That such a demand was made was denied by the defendant's witness, Marshall, the Vice President of the defendant. But, notwithstanding, the defendant at that time did not make a tender to pay Gilbert the balance of his earned wages (A61, A153-A155).

Between August 22, 1972 and March 28, 1973, the defendant had several further negotiation sessions with Gilbert's Union regarding the disputed overtime; and, on March 28, 1973, under the

claim that a Union representative authorized a settlement of Gilbert's overtime dispute, the defendant mailed Gilbert, in care of the Union, a check in the sum of \$76.14 representing the shipowner's contention as to the amount due Gilbert with respect to overtime (A155-A160). Prior thereto, and in February of 1973, the defendant mailed a wage and tax statement to Gilbert at his residence in Yokohama, Japan (A56-A57, A108).

On May 18, 1973, Gilbert, acting pro se, instituted this action, and the defendant was served on May 24, 1973.

On July 11, 1973, defendant's attorneys wrote a letter to Gilbert, addressing it to Gilbert's New York City address, with respect to the taking of Gilbert's deposition, scheduling same for July 25, 1973 at the defendant's attorneys' office (A205). Gilbert appeared at the attorneys' office, and his deposition was taken; but, no tender of Gilbert's wages was made to him, although the letter of July 11, 1973 states that the defendant is holding the wages and is prepared to pay Gilbert (A205).

On December 5, 1974 and December 6, 1974, Gilbert appeared before the Court below for the trial of this action; and, although Gilbert as well as the defendant's Paymaster and Vice President were present at the trial, no tender of Gilbert's wages was made.

The defendant's Paymaster testified that no way can a man present him with a voucher and be paid his wages, unless the voucher was signed by a Shipping Commissioner, in addition to obtaining a certificate of mutual release from the Shipping Commissioner; and that neither the Master's certificate of discharge given to Gilbert nor the pay voucher would suffice for the payment of earned wages to Gilbert (A104-A107, A165-A166), although the Paymaster knew that Gilbert was discharged on May 20, 1972 and had wages coming to him (A113), and that the voyage probably terminated ten months following Gilbert's discharge (A106).

The preconditions set forth by the defendant relating to the requirement that Gilbert appear before a United States Shipping Commissioner before

payment would be allowed was stated by the defendant for the first time upon the trial; and the record does not reflect that the defendant previously advised Gilbert of these conditions.

Subsequent to the entry of judgment herein, and on April 18, 1975, although not part of the record herein, the defendant finally paid Gilbert his earned wages under the pay voucher, but only after Gilbert made an appearance before the United States Shipping Commissioner in New York.

The Court below held that Gilbert was properly discharged in accordance with the terms of his employment and paid off by the Master in Ras Tanura with \$2,000.00 cash and a pay voucher, pursuant to Gilbert's request, on the grounds that, although Gilbert demanded to be taken to a United States Consular Officer for discharge, a Consular Officer was not available.

The Court further found that Gilbert never went to the defendant's office with the voucher to collect his earned wages, and that there was no failure on the part of the defendant to pay wages

so as to make it liable for the double payment provided by 46 U.S.C. §596.

The Court further held that Gilbert's claim for overtime wages was disposed of by the payment of \$76.14 by the defendant, but awarded the plaintiff, based upon the consent of the defendant, one day's travel time and subsistence in the sum of \$46.56 for Gilbert's travel time from Ras Tanura to New York.

ISSUES PRESENTED

1. Is Gilbert entitled to double wages, pursuant to 46 U.S.C. §596, by reason of the Master discharging Gilbert in a foreign port with payment of less than his earned wages without the approval of a United States Consular Officer?
2. Was the shipowner's neglect to pay Gilbert his earned wages without sufficient cause for any part or all of the time that Gilbert was in fact not paid?
3. Did the Court below err as a matter of law in failing to grant judgment in favor of the

plaintiff in the sum of \$5,121.19, with interest thereon and costs, which amount was conceded to be due and owing throughout?

4. Did the Court below err as a matter of law in finding that Gilbert's overtime wage claim was disposed of by the shipowner's payment of \$76.14 absent any evidence of Gilbert's acceptance of such amount in settlement of such claim?

POINT I

THE COURT BELOW, IN RELIEVING THE MASTER FROM HIS STATUTORY DUTY TO DISCHARGE AND PAY OFF GILBERT BEFORE A UNITED STATES CONSULAR OFFICER, ERRED AS A MATTER OF FACT AND LAW. PAYMENT OF LESS THAN GILBERT'S FULL WAGES WITHOUT THE APPROVAL AND SANCTION OF A UNITED STATES CONSUL WAS UNWARRANTED AND WITHOUT SUFFICIENT CAUSE WITHIN THE MEANING OF 46 U.S.C. §596, SO AS TO MAKE THE SHIPOWNER LIABLE FOR STATUTORY PENALTIES FOR THE FULL PERIOD OF TIME OF THE WITHHOLDING OF GILBERT'S WAGES. A FINDING THAT GILBERT REQUESTED PAYMENT OF LESS THAN HIS FULL WAGES AT THE TIME OF HIS DISCHARGE IS IMMATERIAL AS A MATTER OF LAW AND DOES NOT CONSTITUTE SUFFICIENT CAUSE FOR THE SHIPOWNER'S DEVIATION FROM THE MANDATE OF 46 U.S.C. §596 IN LIGHT OF THE SHIPOWNER'S FAILURE OF HIS DUTY TO OBTAIN THE APPROVAL OF A UNITED STATES CONSUL FOR SUCH DEVIATION.

46 U.S.C. §682 requires that the discharge and payment of a seaman's earned wages in a foreign port be consummated before a United States Consular Officer.<sup>1</sup> The rules applicable to 46 U.S.C. §682, as set forth in 22 C.F.R. §82.16 and §82.17, make it unlawful to discharge a seaman in a foreign port or make payment to seaman of any amount less than his full earned wages without the sanction of the Consul; and it is immaterial that the seaman consents to a discharge and elects to accept part of his wages in the form of a voucher, unless the seaman is specifically present before the Consul, and the discharge and mode of payment made with the sanction of the Consul and in the manner set forth by law.<sup>2</sup>

The only exception to the foregoing is found in 46 U.S.C. §683<sup>3</sup> relating to the discharge and payment of ill or incapacitated seamen, and then the wages due must be paid to the Consul or, if the Master does not have sufficient monies

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1. See Addendum, page 1a

2. See Addendum, page 2a

3. See Addendum, page 3a

available, then with an order on the owner for the amount due. 46 C.F.R. §14-10-20.<sup>4</sup>

46 U.S.C. §596,<sup>5</sup>as is applicable here, provides that a seaman discharged in a foreign port shall be paid his full earned wages within four days after the seaman has been discharged or within twenty-four hours after the cargo has been discharged, whichever first happens; and in all cases the seaman shall receive at least one-third of his wages earned at the time of discharge. Failure or neglect to meet this statutory mandate as to time of payment without sufficient cause requires payment to the seaman of a sum equal to two days' pay for each day during which payment is delayed.

These statutes pertaining to the payment of a seaman's wages when discharged in a foreign port are part of the Congressional statutory scheme created for the protection of the seaman and to secure prompt payment of his wages. Isbrandtsen v. Johnson, 343 U.S. 779,784-786, 72 S.Ct. 1011, 96 L.Ed. 1294 (1952).

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4. See Addendum, page 4a

5. See Addendum, page 1a

Thus, the statutes make it clear with respect to a seaman discharged in a foreign port that any deviation from payment of a seaman's wages in the time mandated in 46 U.S.C. §596 must be obtained through the sanction of a United States Consular Officer; and, as aforesaid, it is immaterial as a matter of law that a Master claims a seaman's consent as to either his discharge or payment of less than his full wages or, for that matter, payment of any amount and under any circumstances contrary to 46 U.S.C. §596.

It is submitted that, were it otherwise, the statutory scheme molded by Congress for the protection of a seaman's wages would be without meaning, and time and mode of payment would be in the control of the ship's Master who need only urge consent as total justification for the Master's violation and disregard of the seaman's payment statutes enacted for the protection of the seaman.

That statutory scheme is so strong that a shipowner will not be heard to argue a defense of mutual consent even in a case where the Consul is

present, and the Consul himself neglects to comply with the rules; Miner v. Harbeck, 17 Fed.Cas. 437, Cas.No. 9629 (1849); and a seaman will not be heard to urge a complaint of cruelty as a justification for desertion of his vessel where the seaman fails to seek the assistance of a Consul. Ennis v. Waterman S.S. Corp., 49 F.Supp. 685 (S.D.N.Y., 1943).

Here, the Court below was clearly erroneous in its finding that a Consul was not available upon the discharge of Gilbert as a matter of fact and in error as a matter of law.

Firstly, a United States Consular Officer, although perhaps not available in Ras Tanura, the exact port of discharge, was available within an hour's drive by automobile, to whom, on a previous occasion, the Master had appeared through the simple arrangement with a Suida boarding officer (A142-A147). Moreover, the Master received a telegram on May 18, 1972, two days prior to the discharge, and had two days in which to make whatever arrangements were necessary for the consummation of Gilbert's discharge and payoff before the Consular Officer in

Dhahran.

But, even if there was no Consul available in Ras Tanura to supervise Gilbert's discharge, there was a Consul available in the port of Bahrein which was the vessel's next port of call; and, in fact, the vessel arrived in Bahrein the day after discharge at 1:55 p.m. (A120, A142, A208). Although there was some conflict in the testimony as to whether Gilbert requested to remain on the vessel for the purposes of appearing with the Master for discharge before the Consul in Bahrein, it was the duty of the Master to carry Gilbert to the port of Bahrein and consummate Gilbert's discharge and payoff before and with the approval of the Consul there. 1 Norris, Law of Seamen, §44 at 89. The record is barren of any evidence upon which to excuse the Master's failure to make payment of Gilbert's wages, whether in full or by voucher, before and with the sanction of a United States Consular Officer as mandated by law. The Golden Sun, 30 F.Supp. 354,356; The T.F. Oakes, 36 F. 442,445.

It is submitted that the failure of the

Master to discharge and pay off Gilbert before a United States Consular Officer was inexcusable, arbitrary, and clearly without sufficient cause; and, accordingly, the method of payment to Gilbert having not been sanctioned by a United States Consular Officer as required by law, the Master has failed to show sufficient cause for failure to pay Gilbert his wages in full within the meaning and intent of 46 U.S.C. §596. Gilbert is entitled to an award of a sum equal to two days' pay for each and every day during which payment of his wages was delayed by the defendant.

POINT II

THE SHIPOWNER'S WITHHOLDING OF GILBERT'S WAGES CONSTITUTED UNWARRANTED AND UNREASONABLE CONDUCT AS EARLY AS AUGUST 22, 1972, AND WHICH WITHHOLDING CONTINUED THEREAFTER WITHOUT SUFFICIENT CAUSE SO AS TO ENTITLE GILBERT TO AN AWARD OF DOUBLE WAGES AS A MATTER OF LAW.

That Gilbert had earned wages due him in the sum of \$5,121.19 was never in issue. The shipowner, through its Paymaster, Geiger, knew that Gilbert was not paid his wages in full (A113). The

shipowner, through its Vice President, Marshall, admitted that Gilbert presented himself at the shipowner's office on August 22, 1972, but made no tender of payment of wages. Marshall's excuse for his failure to make a tender then, that he was without knowledge that Gilbert had not been paid, is without sufficient cause. The defendant herein is in fact the "owner" within the meaning of 46 U.S.C. §596 and, as such, is primarily responsible to the seaman for his wages. The "owner" had knowledge through its Paymaster.

The undisputed facts reflected in the record below concerning the period from August 22, 1972 through May 18, 1973 evidences the continuing neglect of the shipowner to tender or pay Gilbert his wages.

Marshall learned that Gilbert had not been paid either in August, 1972 or, at the very latest, by the end of 1972 (A163-A164). The shipowner knew that Gilbert resided in Japan, as it sent Gilbert's wage and tax statement to Gilbert's home address in Yokohama, Japan, in February, 1973 (A108).

It had been negotiating with representatives

of Gilbert's Union concerning an overtime wage dispute since August 22, 1972 and, in fact, forwarded a check in the sum of \$76.14, together with a pay voucher, to Gilbert in care of the Union on March 28, 1973 (A160). The shipping articles of the voyage upon which Gilbert was employed ended about March, 1973 (106).

But, although the shipowner was in constant communication with Gilbert's Union, both personally and by mail, tendered payment of the disputed overtime wages to Gilbert through the Union, mailed the 1972 tax and wage statement to Gilbert's home in Yokohama, and even though the ship's articles closed, at no time did the shipowner tender payment to Gilbert of his undisputed earned wages nor provide sufficient cause for its failure or neglect to do so.

If Gilbert failed to present himself at the defendant's office with his pay voucher to collect his due, as the Court below found, such failure under the facts of this case does not constitute sufficient cause for the defendant's neglect to tender Gilbert his wages.

The law does not require one to do a vain or useless act. Firstly, presentation of a pay voucher does not constitute a lawful pre-requisite to payment of earned wages. The shipowner had copies of the voucher and full knowledge of the amount of its undisputed debt to Gilbert. The voucher is given to a seaman for his sole benefit as an accounting and evidence of the Master's certification of the balance due the seaman for the services rendered by the seaman. It does not in law represent something of the nature of a promissory note requiring presentation for payment.

But, even had Gilbert presented himself at defendant's office after August 22, 1972 (as he did on August 22, 1972) and with the pay voucher, it would have been a vain act, as, under the testimony of Geiger and Marshall, he would not have been paid in any event unless he complied with the defendant's demand that he have a Shipping Commissioner sign the pay voucher and obtain a certificate of mutual release from the Shipping Commissioner (A104-A107, A165-A166).

Gilbert was discharged in the foreign port of Ras Tanura, Saudi Arabia by operation of the Master. 1 Norris, Law of Seamen, §40 at 82. See also: McAvey v. Emergency Fleet Corporation, 15 F.2d 405. His discharge was complete, and there is no requirement in law that he present himself before a Shipping Commissioner in New York, or elsewhere for that matter, as a condition to payment of his earned wages, or sign a certificate of mutual release, or have a Shipping Commissioner sign his pay voucher.

All 46 U.S.C. §596 requires as a condition to payment within the time limitation prescribed therein is that the seaman be discharged. The requirement of discharge and signing of a mutual release before a Shipping Commissioner is applicable to seamen discharged in the United States. 46 U.S.C. §641.

Here, Gilbert signed both the articles of discharge and the mutual release and was given a certificate of discharge by the Master (A129).

The shipowner's conditioning of payment upon the requirement that Gilbert perform acts not

required by the law constitutes failure of neglect to pay "without sufficient cause" within the meaning of 46 U.S.C. §596. Forster v. Oro Navigation Company, 128 F.Supp. 113,115, aff'd 228 F.2d 319 (2d Cir., 1955).

It is submitted that the shipowner's reliance upon requiring Gilbert to go to the Shipping Commissioner in New York, sign a mutual release, or have his pay voucher signed by such Commissioner, clearly evidences the shipowner's unwarranted and unreasonable conduct and bad faith. 1 Norris, Law of Seamen, §385 at 461,462. The excuse becomes frivolous and the withholding of the wages arbitrary when viewed in the light of the fact that Gilbert was never advised by the defendant until the trial of its conditions for payment and the defendant's testimony that Gilbert was entitled to payment of all of his wages in cash on the day of his discharge in Ras Tanura on May 20, 1972 without more; but, payment thereafter was conditioned (A136).

The Court may postpone the running of

double wages, confining them to the period of time after any equity supporting the shipowner's failure to make payment has disappeared. Southern Cross S.S. Co. v. Firipis, 285 F.2d 651; Mystic S.S. Co. v. Stromland, 20 F.2d 342, reh. den., 21 F.2d 607, cert. den., 48 S.Ct. 213, 276 U.S. 618, 72 L.Ed. 734.

If there was equity supporting the defendant's failure or neglect to pay from between August 22, 1972 and May 23, 1973, certainly, such equity completely evaporated upon the defendant being served with the summons and complaint on May 24, 1973, which complaint made it absolutely clear that Gilbert was demanding, among other relief, at least his earned wages in the sum of \$5,121.19. Moreover, plaintiff appeared at the defendant's attorneys' office on July 25, 1973, pursuant to the demand for the defendant to take his deposition; and, finally, the action was tried on December 5, 1974 and December 6, 1974, at which trial Gilbert was personally present, as was the Vice President Marshall and Paymaster Geiger. But, at no time throughout the one year and ten months that Gilbert prosecuted his

action, and in light of the fact that the earned wages were conceded at all times to be due and owing, did the defendant make a tender of payment of the wages.

Gilbert made his demand for his earned wages loud and clear, although, as a matter of law, no demand was necessary, as the duty rests upon the shipowner to make payment to a seaman of his earned wages. Mavromatis v. United Greek Shipowners Corp., 179 F.2d 310,317.

At the very least, defendant could have tendered the wages not in dispute merely by depositing the wages in the registry of the Court. Rule 67, F.R.C.P.; Rule 3219, C.P.L.R.; Gerber v. Spencer, 278 F. 886; Forster v. Oro Navigation Company, 128 F.Supp. 113,115, aff'd 228 F.2d 319 (2d Circ., 1955); Samad v. The Etivebank, 134 F. Supp. 530. See also: Watson v. Dynamic Instrument Corp., 153 N.Y.S.2d 765,767.

Defendant's letter of July 11, 1973 does not constitute a tender of wages as a matter of fact or law, for, in light of the testimony of both

Geiger and Marshall, the defendants were not in fact prepared to pay Gilbert his wages unless Gilbert fulfilled the defendant's extra-legal condition of appearing before the Shipping Commissioner in New York. Nor does the letter advise Gilbert of the condition.

It is settled law that there is a heavy burden upon the shipowner to show a legal justification for the withholding of a seaman's wages. Butler v. U.S. War Shipping Administration, 68 F.Supp. 441; U.S. Bulk Carriers, Inc. v. Arguelles, 408 F.2d 1065, aff'd 91 S.Ct. 409, 400 U.S. 351, 27 L.Ed.2d 456 (1971).

It is submitted that, under the applicable law, the defendant has failed to meet that burden of proof. But, on the contrary, the defendant's withholding of the wages through to the time of payment of April 18, 1975 was without sufficient cause within the meaning of 46 U.S.C. §596.

### POINT III

THERE WAS NO SETTLEMENT OF GILBERT'S  
OVERTIME WAGE CLAIM AS A MATTER OF  
LAW.

The only evidence before the Court below

with respect to a settlement of Gilbert's overtime wage claim was the testimony of Marshall stating that Mr. Colon of the Union authorized the settlement in the sum of \$76.14 (A160).

There was no evidence of either an oral or a written agreement by Gilbert to that alleged settlement, absent which the settlement can be considered but proposed, not consummated. The Courts of Admiralty have throughout their existence carefully scrutinized seamen's settlements and releases and provided the seaman with the utmost protective care relating to settlements, especially with regard to wages. 1 Norris, Law of Seamen, §501, et. seq., at 593, et. seq.

In fact, the record discloses anything but an agreement on the part of Gilbert, as is evidenced by Gilbert's refusal to cash the check and Gilbert's ten-page letter of November 27, 1972 addressed to the defendant in reply to defendant's offer to dispose of the overtime dispute by payment of \$76.14 (A185, A217-A227).

POINT IV

THE OMISSION OF THE COURT BELOW  
TO GRANT JUDGMENT TO GILBERT IN  
THE SUM OF \$5,121.19 WAS ERROR  
AS A MATTER OF LAW.

The defendant at no time disputed Gilbert's claim that he was entitled to payment of his earned wages in the sum of \$5,121.19 as reflected in the pay voucher. Indeed, the defendant conceded this fact throughout. Accordingly, Gilbert was entitled to the granting of judgment in his favor in at least that sum, together with interest and costs.

CONCLUSION

It is respectfully submitted that the judgment of the Court below should be reversed, with directions that the case be remanded for trial on the plaintiff's claim for overtime wages, and that judgment be entered thereafter with respect to that claim, together with judgment in favor of the plaintiff and against the defendant in the sum of \$5,121.19, with interest thereon from May 20, 1972 to April 18, 1975, the date of payment, with an additional amount of double wages for the maximum time from May 20, 1972 through April 18, 1975

or the minimum time from August 22, 1975 through  
April 18, 1975, together with costs.

Respectfully Submitted,

DONALD D. OLMAN  
Attorney for Plaintiff-Appellant

A D D E N D U M



**§ 682. Wages on discharge.**

Upon the application of the master of any vessel to a consular officer to discharge a seaman, or upon the application of any seaman for his own discharge, if it appears to such officer that said seaman has completed his shipping agreement, or is entitled to his discharge under any Act of Congress or according to the general principles or usages of maritime law as recognized in the United States, such officer shall discharge said seaman, and require from the master of said vessel, before such discharge shall be made, payment of the wages which may then be due said seaman; but no payment of extra wages shall be required by any consular officer upon such discharge of any seaman except as provided in sections 658, 683, 684, and 685 of this title. (RS § 4580; June 26, 1884, ch 121, § 2, 23 Stat 54.)

**§ 596. Time for payment.**

The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage. This section shall not apply to fishing or whaling vessels or yachts. (RS § 4529; Dec. 21, 1898, ch 28, §§ 4, 26, 30 Stat 756, 764; Mar. 4, 1915, ch 153, § 3, 38 Stat 1164.)

## § 82.16

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fore so certifying, make sure that the seaman understands and has signed the shipping agreement as required.

## § 82.16 Discharge of seamen.

(a) The master of a vessel of the United States cannot lawfully discharge a seaman in a foreign port without the intervention of the United States consular officer if the seaman signed the shipping agreement before a United States Shipping Commissioner or consular officer; and it is not material in such case that the discharge is made with the seaman's consent or that he has been guilty of misconduct, or is not a citizen of the United States. [7 Op. Att. Gen. 349.]

(b) A United States consular officer is authorized to discharge a seaman upon the application of the master of any vessel of the United States or upon the application of any seaman for his own discharge, if such officer is satisfied that the seaman has completed his shipping agreement or is entitled to his discharge under any act of Congress or according to the general principles or usages of maritime law as recognized in the United States. When a request is made for the discharge of a seaman, a consular officer shall inquire carefully into the facts and circumstances, and shall satisfy himself that good and substantial reasons exist for a discharge before granting the application. The seaman must be physically present to be discharged.

(R. S. 4580, as amended; 40 U. S. C. 682)

## § 82.17 Consular responsibilities for payment of wages.

(a) *Wages and extra wages due American seamen.* When a United States consular officer discharges a seaman in a foreign port, the officer shall collect and pay to the seaman the arrears of wages and extra wages due him at the time of discharge, unless the seaman elects to accept, instead of immediate payment of the whole or a portion of his wages, a wage voucher signed by both the master and the seaman, evidencing the amount owed the seaman to be paid in future settlement. If a United States consular officer fails to collect the wages, extra wages or wage voucher on behalf of the seaman, the consular officer becomes accountable to the United States for the full amount thereof. The consular officer is not obligated to collect and pay to a seaman wages accruing to him subsequent to the time of his dis-

charge, and should not intervene in attempts to collect such wages from the vessel's operators.

(b) *Overtime compensation due American seamen.* Overtime paid seamen is technically a part of their wages, but is payable under the provisions of maritime collective bargaining agreements. Consular officers are not, therefore, legally responsible for the collection and payment of overtime wages, and should leave disputes in relation to overtime for settlement in the United States where bargaining machinery has been established to handle them. When such a dispute arises, a simple statement may be attached to the wage voucher by the master indicating that any overtime due will be paid by the ship operator on arrival in the United States in accordance with the collective bargaining agreement.

(c) *Bonus payments to American seamen.* Bonus payments are in a similar category to overtime payments. Such payments may be collected or deferred according to the circumstances. Since masters and consular officers frequently do not have the latest bonus decisions when a seaman is discharged, controversies over bonus payments should be left for settlement upon the seaman's arrival in the United States.

(d) *Wages due American seamen of foreign nationality.* An American seaman of foreign nationality (see §§ 81.1 (j) and 81.6 (b) of this chapter) is entitled to extra wages on his discharge at a foreign port in all cases where an American seaman who is a United States citizen would be so entitled. On the other hand, an alien seaman as defined in § 81.1 (k) of this chapter is not entitled to extra wages upon discharge. [Fed. Cas. No. 16002; 2 F. Rep. 264]

**§ 683. Penalty for neglect of consular officer to collect wages; incapacitated seaman.**

If any consular officer, when discharging any seaman, shall neglect to require the payment of and collect the arrears of wages and extra wages required to be paid in the case of the discharge of any seaman, he shall be accountable to the United States for the full amount thereof. The master shall provide any seaman so discharged with employment on a vessel agreed to by the seaman, or shall provide him with one month's extra wages, if it shall be shown to the satisfaction of the consul that such seaman was not discharged for neglect of duty, incompetency, or injury incurred on the vessel. If the seaman is discharged by voluntary consent before the consul, he shall be entitled to his wages up to the time of his discharge, but not for any further period. If the seaman is discharged on account of injury or illness, incapacitating him for service, the expenses of his maintenance and return to the United States shall be paid from the fund for the maintenance and transportation of destitute American seamen.

*Provided*, That at the discretion of the Commandant of the Coast Guard, and under such regulations as he may prescribe, if any seaman incapacitated from service by injury or illness is on board a vessel so situated that a prompt discharge requiring the personal appearance of the master of the vessel before an American consul or consular agent is impracticable, such seaman may be sent to a consul or consular agent, who shall care for him and defray the cost of his maintenance and transportation, as provided in this paragraph. (RS § 4581; June 26, 1884, ch 121, § 7, 23 Stat 55; Dec. 21, 1898, ch 28, §§ 16, 25, 30 Stat 759, 764; Mar. 4, 1915, ch 153, § 19, 28 Stat 1185; 1946 Reorg Plan No. 3, §§ 101-104, eff July 16, 1946; 11 FR 7875, 60 Stat 1097.)



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that a prompt discharge requiring the personal appearance of the master of the vessel before an American consul or consular agent is impracticable, such seaman may be sent to a consul or consular agent, who shall care for him and defray the cost of his maintenance and transportation, as provided in this paragraph.

(c) The personal appearance of the master of the vessel before an American consul or consular agent to consent to the discharge of a seaman who has been incapacitated by injury or illness may be waived by the consul under the following conditions:

(1) When the condition of the injured or ill seaman is such that prompt medical attendance is necessary and cannot be furnished on shipboard, and

(2) When the master cannot proceed with the seaman to the consul without risk to the crew, the vessel, or the cargo.

(d) When the master cannot appear before the consul in person he will address to the consul in writing a full statement of the facts which render necessary the discharge of the seaman, together with a statement of the reasons why he himself is unable to appear before the consul. The statement should cover the usual particulars set forth in a discharge and should be accompanied with an account of the wages due and with the necessary funds to meet such wages, or (if the cash be not available) with an order on the owner for the amount due.

(e) If the consul shall deem the statement satisfactory, he may discharge the seaman as directed in R.S. 4581, as amended by section 16 of the act of December 21, 1898, and section 19 of the act of March 4, 1915, as if the master were present, attaching to the discharge and to his relief account a copy of the statement submitted by the master.

(f) If the consul shall deem the statement unsatisfactory, he will decline to grant the discharge and direct that the seaman be returned to the vessel at its expense.

§ 14.10-20 Discharge of seamen in special cases.

(a) Section 16 of the act of December 21, 1898 (30 Stat. 759), amended in part R.S. 4581 (46 U.S.C. 683), relating to the discharge of seamen by consuls, to read:

If a seaman is discharged on account of injury or illness, incapacitating him for service, the expenses of his maintenance and return to the United States shall be paid from the fund for the maintenance and transportation of destitute American seamen.

(b) Section 19 of the Seamen's Act of March 4, 1915 (38 Stat. 1185; 46 U.S.C. 683), adds to these words the following:

Provided, That at the discretion of the Commandant of the Coast Guard and under such regulations as he may prescribe, if any seaman incapacitated from service by injury or illness is on board a vessel so situated

Subpart 14.15—Disclosure of Information Regarding Shipment and Discharge of Merchant Mariners

AUTHORITY: 14 U.S.C. 633, 5 U.S.C. 552, sec. 6(b)(1); 80 Stat. 937 (49 U.S.C. 1655(b)(1)); 49 CFR 146(b).

SOURCE: CGD 73-64R, 38 FR 12403, May 11, 1973, unless otherwise noted.

Due and timely service of Two copies  
of the within *BRIEF* is hereby  
admitted this 29<sup>th</sup> day of AUGUST 1975

.....  
Attorneys for *APPELLANT*

COPY RECEIVED

AUG 29 1975

HILL, RYKINS, CAREY, LOESBERG & O'BRIEN

*[Signature]*

